SUPREME COURT, U.S.
FILED

01 14 16 APR 18 2002

OFFICE OF THE CLERK

CASE NO.: _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Brenda Lee Nadell, et. al. , Petitioners

vs.

Las Vegas Metropolitan Police Department, et. al., Respondents

ON PETITION FOR WRIT OF CENTIORARI

BRENDA NADELL
8225 Cretan Blue Lane
Las Vegas, NV 89128
(702) 319-7174

4688

QUESTION(S) PRESENTED

1. WHETHER IT WAS PROPER TO DETERMINE APPELLANT HAD NO REASONABLE EXPECTATION OF PRIVACY, THEREBY DISMISSING APPELLANTS ILLEGAL SEARCH CLAIM.

2. WHETHER IT WAS IMPROPER TO ISSUE A JURY INSTRUCTION FOR NOMINAL DAMAGES WHEN THE TRIAL CONVICTED APPELLEES OF EXCESSIVE FORCE

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover sheet.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject to this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....

JURISDICTION.....

CONSTITUTIONAL AND STATUTORY PROVISIONS

INVOLVED.....

STATEMENT OF THE CASE.....

REASONS FOR GRANTING THE WRIT.....

CONCLUSION.....

INDEX TO APPENDICES

APPENDIX A OPINION OF NINTH CIRCUIT COURT OF APPEALS

APPENDIX B OPINION OF UNITED STATES DISTRICT COURT

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996)

Hill v. McIntrye, 884 F.2d 271 (6th Cir. 1989)

People v. Musselwhite, 17 Cal. 4th 1216 (1988)

Daubert v. Merrell Dow Pharmaceuticals, 559 U.S. 579 (1993)

Frye v. United States, 54 App. D.C. 46, 47, 293, F1013, 1014 (1923)

STATUTES AND RULES

Federal Rules of Civil Procedure 50

Federal Rules of Evidence 401, 402, 403, 592, 587, 588, 589

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below:

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported, or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported, or,
[X] is unpublished.

[ ] For cases at **state courts:**

The opinion of the highest state court to review the merits appears at Appendix ____ to the petition and is

[ ] reported at _____;or,
[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

The opinion of the _____court appears at Appendix ___ to the petition and is
[ ] reported at_____; or
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

1.
JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application no. ____A_____.

The jurisdiction of this Court is invoked under 28 U.S.C.subsection 1254(1).

[ ] For cases from **state courts:**

The date on which the United States Court of Appeals decided my case was _____.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application no. ____A_____.

The jurisdiction of this Court is invoked under 28 U.S.C.subsection 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Appellants herein filed a lawsuit on September 8, 1995, against the Las Vegas Metropolitan Police Department ("LVMPD"), Officers Leyba, Etherton and Zeil. CR1. An ANSWER was filed on September 25, 1995. A first AMENDED COMPLAINT was thereafter filed on January 17, 1997; and an ANSWER was filed on January 27, 1997.

This matter proceeded to trial, lasting from February 8, 1999 through March 1, 1999.

A jury convicted Defendant LEYBA for violating Appellant BRENDA NADELL's civil rights by excessive force in arresting her, and retaliation against her for exercising her First Amendment Rights. The jury also convicted LVMPD, as a result of a plan, policy, custom or scheme, for violating Appellants civil rights, for, among other things, failing to discipline Officer Leyba for use of excessive force; for IAB failing to investigate the false arrest and excess force claims; and for proceeding with false charges against Appellant, in an attempt to divert the possibility of a lawsuit.

Specifically, toward this end, although Appellees acknowledge BRENDA NADELL was drunk to the point of intoxication, and all evidence shows she was "sleeping it off" in a bedroom, she was initially charged with being under the influence of a controlled substance (stimulant), which would render her UP; not DOWN. An internal memo was obtained and provided to the court clearly indicating that these charges should be pursued solely to ensure civil rights charges were not filed against LVMPD! This internal memo is part of the record.

In finding LVMPD and Officer Leyba guilty, the jury awarded the sum of One Dollar as Nominal Damages. Appellant disputes this award, in light of the facts of the matter, the conviction by trial, and the damages incurred to BRENDA NADELL.

Appellant also appealed the District Court's decision to grant Appellee's Motion under F.R.C.P. 50(a), dismissing an illegal search claim, failing to recognize BRENDA NADELL as an overnight guest, entitled to protection under the US Constitution against illegal search and seizure.

These are the major issues appealed by BRENDA

NADELL.

II. STATEMENT OF THE FACTS

Officers Etherton and Zeil were dispatched to a call on July 22, 1994. Upon arrival, the officers noticed an adult male on the front porch sweeping up glass from a broken window. The adult male had been drinking, but has been together enough to sweep up glass on the front porch. They ascertained this was the homeowner. Clearly, they had conversation with the man. The man indicated that the ambulance had just left, and testified the police just "barged in". The officers at this point would have the court believe they did ask this man anything, and they proceeded to enter the residence through the open door in anticipation of an emergency situation. The officers alleged there was blood everywhere. This testimony was disputed by those present in the household, as well as the ambulance driver, who indicated the small amount of blood on the leg of CRYSTAL, one of the house guests, was washed off by them when they arrived.

By Appellees own testimony, the ambulance left approximately three minutes prior to the arrival of the officers, who failed to learn from the adult male cleaning up glass that the

ambulance had left.

There was no way blood would have been all over the outside and the inside of the residence as alleged by officers to substantiate their entering the home without a warrant. Not in three minutes. Not when the victim had been transported by ambulance.

Somehow, the officers were have the court believe they were so inefficient that they somehow overlooked asking the adult male sweeping up glass what happened, and failed to learn that the ambulance had left moment ago.

Upon entering the residence, the officers observed a young female with a baby in her arms, exiting the living room area. This was CRYSTAL, the sister of Appellant BRENDA NADELL, and the infant child of BRENDA and BRIAN NADELL. The police allege they saw blood on her person, though this directly contradicts testimony of the ambulance driver, who indicated that he washed the little blood off her leg, to ensure she was not injured. The police then indicate they requested she stop, but she continued to walk to a back bedroom. This was denied by CRYSTAL. However, the police had to attempt to substantiate

why they failed to obtain pertinent information from the adult male sweeping the glass on the front porch, and entered the residence; and why they proceeded into the back bedroom, where they encountered BRENDA NADELL, who was sleeping until awakened by the flash light of officers in the bedroom.

From this point on, Appellees allege all testimony is undisputed, as there is their side; and BRENDA NADELLs side; and according to Appellees, she was so intoxicated that she could not know what occurred; thus their summation that information is undisputed!

After entering the bedroom and observing BRENDA NADELL asleep, then awakened and upset, they allege they tried to ascertain from her what occurred! They walked past the home owner sweeping up glass, and CRYSTAL carrying a child in her arms, to speak with an obviously half dressed, intoxicated, and sleeping BRENDA NADELL, to determine what occurred, according to the testimony of the officers.

Officers alleged BRENDA NADELL, 5'3", 110 lbs, punched officer Lebya in his chest, while he was wearing his chest protector, sending him backwards, sending him to the ground.

And then, while face down on her stomach - according to officer testimony - and her hands handcuffed behind her back, kicked Officer Etherson who is approximately 6'4", 230 lbs, and solid as a rock. This could not physically, and did not, happen! However, this is the officers justification for their use of restraint and battery of a police office allegations. In fact, the indentation in the hallway, later verified by investigators in the matter, substantiate that officers slammed the head of BRENDA NADELL into the wall.

The officers dragged to the front, then picked up BRENDA NADELL, carrying her like a pig on her shoulders while she was only in her panties, handcuffed, from the residence, now alleging this was necessary "so as not to permit her to walk on the broken glass near the front door." (Appellees Respond Brief, page 8). This was the very glass they professed the adult male was cleaning up on their arrival!

Even though they had her clothing, they transported her half naked!

At the time of trial, a tape recording that had been admittedly tainted and tampered with by the officers, was played at

the time of trial! This tape was recorded while transporting a justifiably angry BRENDA NADELL to the Clark County Detention Center (CCDC).

While in the custody of the police officers and CCDC, BRENDA NADELL sustained severe injuries to her hands where the cuffs were so tight they shut off circulation; she was beat in the face has a permanent scar on her chin, severe bruising on the hip, and other injuries substantiated at the time of trial. She was transported to the hospital and received treatment.

Because BRENDA NADELL had no recollection of the officers version of events, they allege this matter is undisputed. It is not only disputed, but also incredible in light of the evidence.

III. ARGUMENT

DISMISSAL OF ILLEGAL SEARCH ISSUE

At the conclusion of the Plaintiffs' case the court ruled as a matter of law that Plaintiffs' Fourth Amendment search claim would be dismissed for the reason that Plaintiff Brenda Nadell had no standing as an invited guest to raise the issue and further found that there were exigent circumstances which allowed the officers to

enter the house without a warrant. However, Plaintiff had a reasonable expectation of privacy, as a sleeping and unclothed overnight guest and is privileged to challenge the constitutionality of the search of the home and bedroom where she was assaulted. There were no exigent circumstances to justify the warrantless search. This claim was improperly withheld from the jury, requiring a new trial.

Based upon the jury's first question, "Whether or not the officers could enter a home without a warrant in response to a domestic violence dispatch?" it is clear that the jury credited testimony of Michael Laing that the officers "just barged into his house." Brenda Nadell was a social friend who had been invited to the home in contemplation of employment for her younger sister as a live-in babysitter, which employment clearly anticipated that both sister and Plaintiff Brenda Nadell herself would be given a bedroom in the home. The initial employment interview evolved into a social event and involved swimming and consumption of alcohol. After drinking and swimming, the homeowner, MICHAEL LAING, invited BRENDA to stay overnight and gave her the guest bedroom. She was therefore, an invited guest.

Plaintiff changed clothes in the bathroom, and crawled in bed. Plaintiff consumed enough alcohol that she went to sleep with her child in a partially clothed manner. Given the blood alcohol level and rate of absorption established by Defendant's toxicologist, it would have been at least 8, if not more than 12 hours, before she could physically and legally leave the premises and drive home. Consequently, she was, as a matter of fact and law, an overnight guest, with actual and reasonable expectation of privacy.

Plaintiff argues the court wrongful declined to analyze the Plaintiff's search claim in "segments" cf Dickerson v. McClellan, 101 F3d 1151 (6th Cir. 1996). The encounter between Plaintiff Brenda Nadell and the officers had a number of separate cognizable Fourth Amendment phases. Even if the initial entry into the home was not unreasonable because of exigent circumstance (domestic violence call, open door, evidence of injury at the front of the house), the officers unreasonably and negligently failed or refused to attempt to ascertain what had happened from the homeowner before undertaking a search of the house. Had they done so, they would have learned and been able to confirm that no crime had been committed and that the only

injured party had been conveyed from the premises by ambulance prior to the arrival. Further, crediting the testimony of Crystal Whittaker and Brenda Nadell, as the court must for purposes of a Rule 50 motion, the officers learned from them as soon as they entered the bedroom that neither of them were injured, no crime had been committed, the injured person had already been conveyed by EMS and that the ladies did not want them in the bedroom. Under such circumstances, the officers were obligated to break off the search and leave the premises, no exigent circumstances continuing to exist.

Plaintiff believes that the court erred by treating the Rule 50 motion as it would treat a motion to suppress in a criminal case. In a civil case, the court is not called upon to construe credibility, make findings of fact or rule on the legality of search as a matter of law. If there are disputed facts, they are to be submitted to the jury. Hill v. McIntrye, 884 F.2d 271(6th Cir. 1989).

The removal of the search issue from the jury's consideration impacted the Jury's consideration of the legality of the arrest. Consequently, Plaintiffs believe it proper to reinstate the unreasonable search claim, set aside the verdict of no cause of

action on the false arrest claim, and reinstate the Defendants Etherton and Zeal on those claims.

JURY INSTRUCTION FOR NOMINAL DAMAGES ISSUE

The Court gave a nominal damage jury instruction over Plaintiff's object, and an award of $1.00 in damages was granted.

On page 117 of the transcript of the instructions conference on February 24, 1999, Defendants asked for a nominal damage instruction and pointed out that the court had left it out of its proposed instructions. Plaintiffs specifically objected. [Tr. 2/24/99, p. 118) then specifically said that a jury "could conceivably find that she hadn't been able to establish any damages." There ensued discussion between Augulo and the Court about a case called Haupt, which does not appear to be relevant to this matter. Plaintiff's specifically objected that nominal damages not be forced on the Plaintiffs at Defendant's option, Tr. 2/23/99, p. 119.

> We object because in this case there is no question that she incurred medical expenses in excess of a dollar, even from the ambulance company that took her from the jail to the

hospital where she was involuntarily held, from the doctor. And nobody has said she wasn't severely depresses as of August 18 when she saw Dr. Mortillaro...and therefore...in my view, there is just no way that if we prevail on any claim that the damages can be a dollar. I think it is an invitation to mischief. [Emphasis added.]

At Tr. 2/24/99, p.120, the court overruled Plaintiffs' specific objection and gave Ninth Circuit pattern instruction 11.04 which contained the nominal damage language.

Given the facts adduced at the trial, Plaintiff's content the nominal damage instruction constituted reversible error, and that Plaintiffs are entitled to compensatory damages as a matter of law. The verdict works a substantial injustice, and is against the great weight of the evidence, each and all of which require a new trial on the issue of damages.

The facts substantiated that Plaintiff Brenda Nadell was injured both physically and psychologically. This is not in dispute. The injuries were substantiated by photographs taken by (a) the Internal Affairs Bureau (Plaintiffs' Exhibit 002(A-BB)) taken on July 25, 1994; (b) the photographs taken by the family on July 24,

1994, (Plaintiffs' Exhibit 003(A)); and (c) the photographs taken by the investigator, Robert Gillespie, on August 1, 1994 (Plaintiffs' Exhibit 003(B)). These photographs demonstrate Brenda Nadell had visible injuries to her forehead, left cheek, chin, both wrists, both elbows, both upper arms, both knees, left thigh, left leg, and both ankles. Defendants never denied that some of the physical injuries were caused by them, although they suggested that some of the injuries may have been self-inflicted, caused by third parties or the result of their use of reasonable force in the process of arrest.

Because the jury found Officer Leyba guilty of excessive force, they must have found that he committed excessive force in hitting Plaintiff in her vaginal area prior to arrest, slamming her against the wall and beating her to the floor during the arrest and/or injuring her while carrying/conveying her to the vehicle. Brenda Nadell had vaginal bleeding the night after her discharge from custody. She also complained of extreme soreness and inability to use her arms and wrist from the handcuffing and face-down carrying by her arms and feet.

Additionally, Defendants own medical witness, Dr. Angeline Fitzgerald, in Defendants' Exhibit 536.16, reported that

as of 11:00 p.m. on the evening of 7/22/94, "Brenda Nadell stated that the police her her" noting a large hematoma, contusion under the mid-chin area with tenderness" and "multiple abrasions and contusions to the elbows and knees and contusions to the left arm"...Dr. Fitzgerald's testimony regarding the appearance and aging of bruises indicated that is was more, rather than less likely, that the trauma occurred earlier (at the residence), rather than later (at the CCDC). The difference was 35 to 45 minutes. This evidence came from Defendants taking Plaintiff to the hospital after they arrested her, which shows that there were injuries in itself. Dr. Fitzgerald prescribed pain medication and directed Brenda Nadell "return for increased pain, increased swelling, persistent or worsening symptoms, or other problems." Upon release, she did so when she visited Dr. Abdel Khalek at the UMC Quick Care at the Lakes Clinic. He notes (Plaintiffs' Exhibit 017) "Many bruises, contusions from face to feet, states was assaulted by police." He diagnosed "assault" and prescribed both naprosin and tylenol for pain and swelling. At the trial he indicated that it was extremely unlikely that the injuries were self-inflicted. He corroborated Dr. Fitzgerald on the appearance and aging of the

bruises, indicating that it was more likely that the trauma occurred earlier.

She was diagnosed by Dr. Louis Mortillaro as "massively depressed" on August 18, 1994, and she was treated by him for nearly ten months. She was referred to neurologist Dr. Michael Kreiger, who diagnosed a mild-traumatic brain injury, concussion and bi-lateral wrist, nerve damage. She began a course of treatment with him which lasted almost two (2) years, including a continuing need for medication. In July, 1996, she was still found to be significantly depressed by Dr. Terence Campbell. She also suffered from post-traumatic stress syndrome. In October and November, 1996, defense doctors, Sutherling and Strickland, confirmed her continuing depression and need for medication almost 2 ½ years post-trauma!

The doctors disagreed about whether or not there was traumatic brain injury, whether or not the effects were permanent, how much the prior history contributed to her anxiety and depression, and how long the depression might last, but there was no disagreement as to the existence of clinical depression over a lengthy period of time requiring counseling and medication. Nore

was it disputed that at least a portion of the psychological injury was caused by or exacerbated by the acts Defendant was found guilty of, which were found to have violated Plaintiff's rights.

Special medical damaged, Plaintiffs put in by stipulation (Exhibit 020), including:

Mercy Ambulance	$237.00
OMC Emergency	$271.00
Dr. Khalek	$ 55.00
Prescriptions of 12/24/94	$ 11.95
Dr. Mortellaro	$1,150

(Other prescriptions were not produced for trial, however direct testimony of Brenda Nadell and Dr. Kreiger indicates there were at least a few hundred dollars more in prescriptions)

Dr. Kreigers bill	$17,255.00

(Although arguably costs for QEEG of $750 were included in this.)

Additionally, although the defense argued against legal cause and medical necessity of perionatal clinic bills, according to Dr. Bohamn, there was a minimal bill of $400. Dr. Meger testified that the termination of pregnancy cost $450.00.

At least some of the nearly $20,000 in medical bills were reasonable, necessary and incurred as a result of the use of excessive force.

Additionally, because Defendant Leyba and the LVMPD were fould liable for First Amendment retaliation in the prosecution of Plaintiff Brenda Nadell, she incurred the $5,000 in criminal defense fees, as established by William Cooper, Esq., who handled the case for the first month before referring the matter to other attorneys. These are undisputed special damages.

Moreover, these damages were incurred due to the proven malicious prosecution of Plaintiff BRENDA LEE NADELL by the Defendant Las Vegas Metropolitan Police Department and the District Attorney. After indicating the charges had been dropped, there was written and personal communication insisting the charges be reinstated and pursued due to a possible civil lawsuit! The very reason to pursue the action was to discourage Plaintiff from seeking relief from violations of her Constitutional Rights! This was proven to be a cover up by Internal Affairs, who is supposed to resolve, rather than cover up, such matters. Even the County Sheriff tried to have the matter swept under the table,

asking how much money was needed to make this case go away! In spite of the convictions in this matter, in spite of the reports to Internal Affairs, in spite of the proven violations none of the officers involved in this matter received any disciplinary action whatsoever! Clearly, the charges incurred to dismiss the charges against BRENDA LEE NADELL was not only financial, but also extremely emotionally expensive. There must be some type of liability attached to a police department that would carry a cover up to this extreme, in violation of all ethically, civil and Constitutional rights!

Given all the damages indicated, including undisputed special damages, Plaintiffs contend that the nominal damages instruction and award was inappropriate in this matter. Plaintiff is entitled to actual compensatory damages as a matter of law. These errors are not harmless and constitute the basis for a new trial on damages under Rule 59(a) and it should cause the court to grant relief from judgment in order to avoid substantial injustice under Rule 60(b).

REASONS FOR GRANTING THE PETITION

The Petition should be granted in this matter to preserve the rights of individuals against illegal search and seizure, as intended in the Bill of Rights to the US Constitution. Trained police officers met the homeowner at the time, "barged in" without asking him, and failed to ascertain what was going on prior to entering, then failed to ascertain what was going on when they met with a woman and child; and proceeded to enter a dark bedroom and antagonize a half dressed, sleeping person who was admittedly drunk. Drunk, the police allege, to the point she cannot recall what happened that night; yet, she was disturbed to allegedly ascertain what was not ascertained from the homeowner and the woman with the child they encountered in the living room!

The court never heard that Officer Leyba was accused of excessive force and not reprimanded prior to this incident. The court did not learn he was also accused after this incident, and prior to this trial. Within a week after this trial, one of the officers involved killed someone.

There has been an absorbeniently high number of allegations against the Las Vegas Metropolitan Police Department.

Internal Affairs has long been known as a joke in Clark County, Nevada. In fact, Clark County now has one of the few civilian review boards to oversee the police because they have not been able to oversee themselves. The people of the State of Nevada need to be protected by the US Constitution. This is not a matter of concern solely to Appellant; but a matter of great concern to all residents of Clark County, dealing with the police department. How could something like this occur in this great nation of ours, that the police can brutalize the citizens as set forth in this Judgment, and yet, Plaintiff not be entitled to an award for these damages?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brenda Nadell

Brenda Nadell

Appellant in Proper Person

Dated: 3/15/02

CASE NO.: _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Brenda Lee Nadell, et. al. , Petitioners

vs.

Las Vegas Metropolitan Police Department, et. al., Respondents

PROOF OF SERVICE

I, Emily Stevens, do swear or declare that on this date, 3/15, 2002, as required by Supreme Court Rule 29. I have served and enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

BRIAN C. WHITAKER, ESQ.
301 E. Clark Ave., #1000
Las Vegas, NV 89101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 3/15, 2002.

Emily Stevens
SIGNATURE

APPENDNDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENDA LEE NADELL; BRIAN SIDNEY NADELL,

Plaintiffs-Appellants,

HUGH M. DAVIS; CURT OBRONT; WILLIAM WHITEHEAD, III; ROBERT J. KOSSACK,

Intervenors,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; S. LEYBA, Officer; M. ETHERTON, Officer; G. ZEIL, Officer,

Defendants-Appellees.

No. 99-16383

D.C. No. CV-95-00859-PMP/RLH

BRENDA LEE NADELL; BRIAN SIDNEY NADELL,

Plaintiffs-Appellees,

HUGH M. DAVIS; CURT OBRONT; WILLIAM WHITEHEAD, III; ROBERT J. KOSSACK,

Intervenors,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; S. LEYBA, Officer,

Defendants-Appellants,

M. ETHERTON, Officer; G. ZEIL, Officer,

Defendants.

No. 99-16556

D.C. No. CV-95-00859-PMP/RLH

OPINION

Appeal from the United States District Court
for the District of Nevada
Phillip M. Pro, District Judge, Presiding

Submitted August 14, 2001*—San Francisco, California

Filed October 5, 2001

Before: Henry A. Politz,** Alex Kozinski, and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

Civil Litigation and Procedure/ Evidence — Opinions and Scientific Evidence

The court of appeals affirmed a judgment of the district court in part, and reversed in part. The court held that expert testimony about a quantitative electroencephalogram (QEEG) is properly excluded on a finding that the QEEG is error prone, inadequately subjected to peer review, and unhelpful to the jury because it could not distinguish between previous injuries and injuries a plaintiff seeks to prove in an excessive force claim.

While visiting Michael Laing's home in Las Vegas, Nevada, at his invitation with her sister and daughter, appellant Brenda Nadell had several alcoholic drinks, enough to render her unable to drive. After she went into the guest bedroom to lie down, an altercation between Laing and his ex-

*The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a).

**The Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

wife brought Las Vegas police officers to the house. Laing invited them in. The officers found broken glass in the living room, and Nadell's sister and daughter spattered with blood. An officer asked Nadell's sister to remain in the front room, but she instead took Nadell's daughter into the guest bedroom. The officer followed her and was joined by officer Steven Leyba. Nadell began screaming at the officers and allegedly attacked Leyba, who, aided by the other officer, restrained her by pushing her up against a wall and wrestling her to the ground. Leyba arrested Nadell for battery on a police officer. The district attorney declined to prosecute Nadell.

Nadell and her husband filed an excessive-force complaint against Leyba with the Internal Affairs Bureau of the Las Vegas Metropolitan Police Department (LVMPD). Leyba notified the DA's office of Nadell's complaint, and the DA filed two battery charges against Nadell.

Nadell filed a complaint in federal district court alleging that the appellees LVMPD, Leyba, and others (collectively, the officers) had deprived her of her civil rights in violation of 42 U.S.C. § 1983. Nadell asserted that the officers had subjected her to false arrest, unreasonable search and seizure, and unlawful retaliation in response to her exercise of her First Amendment rights. Nadell proceeded against LVMPD on a municipal liability theory.

In support of her excessive force claims, Nadell sought to call Dr. Michael Krieger as an expert witness to support her claim of physical injury from the force applied during her arrest. Krieger had performed a QEEG, which involves the mathematical processing, analysis, and display of digitally recorded EEG data, on Nadell. After holding a two-day evidentiary hearing, the district court granted the officers' motion to exclude Krieger's testimony, finding the QEEG test to be error prone and inadequately subjected to peer review. The court also found that Krieger's testimony would not be

helpful to the jury because Nadell had suffered serious head injuries as a child and Krieger's QEEG testing could not distinguish between those previous injuries and any injuries incurred during the arrest.

The officers moved for judgment as a matter of law on all claims. At the close of Nadell's evidence, the district court granted only the motion pertaining to Nadell's unreasonable search and seizure claim, holding that as she was temporarily present in Laing's home, Nadell lacked standing to bring the claim under the Fourth Amendment. The jury found that Nadell had not been falsely arrested. However, it found that Leyba had violated Nadell's civil rights by using excessive force in arresting her and by retaliating against her for her exercise of her First Amendment rights. The jury further found that the LVMPD had violated Nadell's civil rights by failing to discipline Leyba for his use of excessive force and by inadequately investigating Nadell's excessive-force claim. It awarded Nadell nominal damages of $1.00. The district court denied the officers' motions for judgment as a matter of law and Nadell's motion for a new trial.

Nadell appealed and the officers cross-appealed.

[1] A district court has broad latitude in deciding how to determine reliability, and its decision to exclude expert testimony is reversed only if manifestly erroneous. The court's conclusions regarding the QEEG were supported in the record of the evidentiary hearing. The district court properly played its gatekeeping role and did not abuse its discretion in excluding the QEEG expert testimony.

[2] To invoke Fourth Amendment protection for a search, a person must demonstrate a legitimate expectation of privacy. In another's home, an overnight guest has a legitimate expectation of privacy, but an individual merely present with the consent of the householder does not. The district court did not clearly err in finding that Nadell was temporarily present

in Laing's home. Thus, Nadell did not have a legitimate expectation of privacy. The district court properly granted the officers' motion for judgment as a matter of law.

[3] Substantial evidence was introduced at trial on Nadell's claim of First Amendment retaliation, enough for the jury to find that Leyba retaliated against Nadell for her complaint to the Internal Affairs Bureau and that such retaliation caused her to become the subject of a criminal action. Leyba's liability was not diminished by the district attorney's office's role in bringing the criminal action, because substantial evidence supported the jury's finding that Leyba's actions proximately caused Nadell's prosecution, since the district attorney's office had formerly decided not to bring prosecution. [4] The right to be free of government retaliation for the exercise of First Amendment activity, a category within which the right to petition the government falls, was clearly established at the time Nadell filed her complaint with the LVMPD. The district court properly denied Leyba's motion for judgment as a matter of law.

[5] Municipal liability is appropriate only when a plaintiff has shown that a constitutional deprivation was directly caused by a municipal policy. A plaintiff cannot prove the existence of a municipal policy or custom based solely on the occurrence of a single incident or unconstitutional action by a non-policymaking employee. [6] There was no evidence introduced at trial to establish that the use of excessive force was a formal policy or widespread practice of the LVMPD or that previous constitutional violations had occurred for which the offending officers were not discharged or reprimanded. Thus, there was insufficient evidence to sustain the jury's finding of municipal liability. The district court's judgment on the issue of municipal liability had to be reversed.

COUNSEL

Brenda Lee Nadell, Brian Sidney Nadell, plaintiffs-appellants, pro se.

Brian C. Whitaker, Peter M. Angulo, Thomas D. Dillard, Jr., Rawlings, Olson, Cannon, Gormley & Desruisseaux, P.C., Las Vegas, Nevada, for the defendants-cross-appellants.

OPINION

O'SCANNLAIN, Circuit Judge:

Among other issues, we must decide whether the trial judge fulfilled his *Daubert* gatekeeping role in excluding certain expert testimony.

I

On July 22, 1994, Brenda Nadell drove her sister and young daughter to Michael Laing's residence in Las Vegas, Nevada, so that her sister could interview for a job. At Laing's invitation, Nadell consumed several alcoholic drinks, enough to render her unable to drive. She went into the guest bedroom to lie down, whereafter an altercation between Laing and his ex-wife brought Las Vegas police officers Gregory Zeil and Michael Etherton to the house. Laing invited them in.

In the living room, the officers found broken glass and Nadell's sister and daughter spattered with blood. Etherton asked Nadell's sister to remain in the front room, but she instead took Nadell's daughter into the guest bedroom. Etherton followed her. Shortly thereafter, police officer Steven Leyba arrived on the scene and joined Etherton in the bedroom. Nadell began screaming at the officers. She then allegedly attacked Leyba, who, aided by Etherton, restrained her by pushing her up against a wall and wrestling her to the ground. Leyba then arrested Nadell for battery on a police officer.

The Clark County District Attorney's office initially declined to prosecute Nadell. However, on July 25, 1994,

Nadell and her husband filed an excessive-force complaint against Leyba with the Internal Affairs Bureau of the Las Vegas Metropolitan Police Department (LVMPD). Leyba notified the DA's office of Nadell's complaint, whereupon the DA filed two misdemeanor battery charges against Nadell.

Nadell filed a complaint in the District Court for the District of Nevada, alleging that the LVMPD, Leyba, and other defendants had deprived her of her civil rights in violation of 42 U.S.C. § 1983.[1] Specifically, Nadell asserted that the defendants had subjected her to false arrest, unreasonable search and seizure, and unlawful retaliation in response to her exercise of her First Amendment rights.[2]

In support of her excessive force claims, Nadell sought to call Dr. Michael Krieger as an expert witness. Dr. Krieger had performed a quantitative electroencephalogram ("QEEG") on Nadell. A conventional EEG monitors and records the brain's electrical activity; the QEEG technique involves the mathematical processing, analysis, and display of digitally recorded EEG data. Nadell contended that her QEEG results supported her claim of physical injury from the force applied during her arrest. The district court granted the defendants' motion to exclude Dr. Krieger's testimony, finding that the QEEG test lacked the requisite reliability.

The defendants moved for judgment as a matter of law on all claims. At the close of the plaintiffs' evidence, the district court granted only the motion pertaining to Nadell's unreasonable search and seizure claim, holding that as she was temporarily present in Laing's home, Nadell lacked standing to bring the claim under the Fourth Amendment.

---

[1]The complaint also named Nadell's husband and daughter as plaintiffs. Their derivative claims are not relevant to either the appeal or cross-appeal.

[2]The allegations of misconduct involving the defendants other than the LVMPD and Leyba are not before us.

The jury found that Nadell had not been falsely arrested. However, it found that Leyba had violated Nadell's civil rights by using excessive force in arresting her and by retaliating against her for her exercise of her First Amendment rights. The jury further found that the LVMPD had violated Nadell's civil rights by failing to discipline Leyba for his use of excessive force and by inadequately investigating Nadell's excessive-force claim. It awarded Nadell nominal damages of $1.00.

The defendants offered renewed motions for judgment as a matter of law on the retaliation, excessive force, and failure to discipline claims. Nadell moved for a new trial on damages and on the unreasonable search and seizure claim. The district court denied each of those motions, and this appeal and cross-appeal followed.

II

[1] Nadell argues that the district court abused its discretion in excluding scientific testimony concerning QEEG tests under Federal Rule of Evidence 702. A district court has broad latitude in deciding how to determine reliability, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 153 (1999), and its decision to exclude expert testimony is reversed only if "manifestly erroneous," *United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000) (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997)) (internal quotation marks omitted). Here, the district court held a two-day evidentiary hearing and found the QEEG test to be "error prone" and inadequately subjected to peer review. The court also found that Dr. Krieger's testimony would not be helpful to the jury because Nadell had suffered serious head injuries as a child and Dr. Krieger's QEEG testing could not distinguish between those previous injuries and any injuries incurred during the arrest. The court's conclusions find considerable support in the record of the evidentiary hearing, including testimony by the leader of a joint task force of the

American Academy of Neurology and the American Clinical Neurophysiology Society that the QEEG technique's subjectivity and tendency to produce "false positives" have kept it from achieving general acceptance for the clinical diagnosis of closed head injuries. The district court properly played its "gatekeeping role," *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993), and did not abuse its discretion in excluding QEEG expert testimony.

III

[2] Nadell asserts that the district court erred in granting defendants' motion for judgment as a matter of law in regards to her claim of a civil rights violation under 42 U.S.C. § 1983 for an unreasonable search. To invoke Fourth Amendment protection for a search, a person must demonstrate a "legitimate expectation of privacy." *United States v. Gamez-Orduno*, 235 F.3d 453, 458 (9th Cir. 2000) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)) (internal quotation marks omitted). In another's home, an overnight guest has a legitimate expectation of privacy, *see Minnesota v. Olson*, 495 U.S. 91, 96-99 (1990), but an individual merely "present with the consent of the householder" does not, *Minnesota v. Carter*, 525 U.S. 83, 90 (1998). The district court did not clearly err in finding that Nadell was not an overnight guest but, rather, that she was merely present with the consent of the householder and had formed no intention to remain overnight — nor, indeed, longer than was necessary to regain sufficient sobriety to drive. Accordingly, Nadell did not have a legitimate expectation of privacy. Therefore, the district court properly granted defendants' motion for judgment as a matter of law.

IV

Nadell argues that the district court abused its discretion by instructing the jury as to the availability of nominal damages. Where a constitutional violation has occurred and a plaintiff

fails to prove actual damages, nominal damages must be awarded. *George v. City of Long Beach*, 973 F.2d 706, 708 (9th Cir. 1992). The district court properly instructed the jury as to the availability of nominal damages, deriving its instruction from the Ninth Circuit's Model Jury Instructions. *See* Model Civ. Jury Instr. 9th Cir. § 11.4. The jury's award of nominal damages was supported by substantial evidence showing that the injuries sustained by Nadell were self-inflicted or a result of her own violent behavior. Thus, the award of only nominal damages was proper, pursuant to the verdict from the properly instructed jury.

V

Cross-appellant Leyba asserts that the district court erred in denying his motion for judgment as a matter of law on Nadell's claim of excessive force. Substantial evidence supported the jury's finding of excessive force; the plaintiff presented corroborated testimony that Leyba repeatedly hit Nadell, pushed her against a wall, and wrestled her to the ground. The district court therefore properly denied defendant's motion.

VI

[3] Leyba also argues that the district court erred in denying his motion for judgment as a matter of law on Nadell's claim of First Amendment retaliation. Substantial evidence was introduced at trial on this point, enough for the jury to find that Leyba retaliated against Nadell for her complaint to the Internal Affairs Bureau and that such retaliation caused her to become the subject of a criminal action. Leyba's liability is not diminished by the district attorney's office's role in bringing the criminal action because substantial evidence supported the jury's finding that Leyba's actions proximately caused Nadell's prosecution, where the district attorney's office had formerly decided not to bring prosecution. *See Borunda v. Richmond*, 885 F.2d 1384, 1390 (9th Cir. 1989) (holding that

police officers are not insulated from civil liability for a prosecutor's decision when the decision was not made by the prosecutor's "independent judgment"); *Smiddy v. Varney*, 665 F.2d 261, 266-67 (9th Cir. 1981) ("[A] showing that the district attorney was pressured or caused by the investigating officers to act contrary to his independent judgment will rebut the presumption [of independent judgment].").

[4] Further, Leyba is not entitled to qualified immunity if the right infringed was "clearly established at the time of the alleged violation," *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)) (internal quotation marks omitted), and if a "reasonable officer" could not have believed his conduct was lawful, *Act/Up! Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). The right to be free of government retaliation for the exercise of First Amendment activity, a category within which the right to petition the government falls, was clearly established at the time Nadell filed her complaint with the LVMPD, *see, e.g.*, *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), and no reasonable officer could have concluded that retaliatory conduct of the sort the jury found occurred in this case was lawful. Therefore, the district court properly denied Leyba's motion for judgment as a matter of law.

VII

[5] Cross-appellant LVMPD argues that the district court erred in denying its motion for judgment as a matter of law on Nadell's claim of municipal liability for Leyba's use of excessive force against her. Municipal liability is only appropriate where a plaintiff has shown that a constitutional deprivation was directly caused by a municipal policy. *Oviatt v. Pearce*, 954 F.2d 1470, 1477-78 (9th Cir. 1992). Such a policy must result from a deliberate choice made by a policy-making official, *id.*, and may be inferred from widespread practices or "evidence of repeated constitutional violations for which the errant municipal officers were not discharged or

reprimanded," *Gillette v. Delmore*, 979 F.2d 1342, 1349 (9th Cir. 1992). "A plaintiff cannot prove the existence of a *municipal* policy or custom based solely on the occurrence of a single incident or unconstitutional action by a non-policymaking employee." *Davis v. City of Ellensburg*, 869 F.2d 1230, 1233 (9th Cir. 1989).

[6] There was no evidence introduced at trial to establish that the use of excessive force was a formal policy or widespread practice of the LVMPD or that previous constitutional violations had occurred for which the offending officers were not discharged or reprimanded. Thus, there was not sufficient evidence to sustain the jury's finding of municipal liability. *See id.* at 1235 ("[Plaintiff] failed to present any evidence of other acts by . . . police officers to prove that the use of excessive force is a widespread practice or custom in the city. Thus, we can[not] infer . . . that the use of excessive force is sufficiently pervasive to rise to the level of a custom . . . ."). Therefore, the district court erred in denying the LVMPD's motion for judgment as a matter of law on the issue of municipal liability for excessive force. The district court's judgment against the LVMPD on this count must therefore be reversed.

AFFIRMED in part and REVERSED in part.

PRINTED FOR
ADMINISTRATIVE OFFICE—U.S. COURTS
BY WEST GROUP—SAN FRANCISCO—(800) 888-3600

The summary, which does not constitute a part of the opinion of the court, is copyrighted
© 2001 by West Group.

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

DISTRICT OF NEVADA

BRENDA LEE NADELL, ET AL.,

Plaintiffs,

V.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, ET AL.,

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV-S-95-859-PMP (RLH)

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The verdict is read in open court. The jury finds by a preponderance of the evidence that Defendant Steven Leyba violated Plaintiff Brenda Nadell's civil rights by using excessive force in arresting her and retaliating against her for her exercise of First Amendment Rights. The jury further finds Defendant Las Vegas Metropolitan Police Department, as a result of a plan, policy, custom or scheme, violated Plaintiff Brenda Nadell's civil rights by failing to discipline Officers Leyba, Etherton and Zeil for use of excessive force and the way in which the Internal Affairs Bureau investigated Plaintiff Brenda Nadell's false arrest and excessive force claims. The jury awards Plaintiff Brenda Nadell $1.00 as the total amount of damages suffered by Plaintiff Brenda Nadell on her claims against defendants. The jury is polled and the court finds the verdict is unanimous.

JUDGMENT IS HEREBY ENTERED in favor of Plaintiff Brenda Lee Nadell and against Defendants.

ENTERED AND SERVED
MAR - 4 1999
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY _____ DEPUTY

FILED
MAR -4 1999
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY _____ DEPUTY

March 1, 1999
Date

LANCE S. WILSON
Clerk

(By) Deputy Clerk

Supreme Court, U.S.
FILED
APR 1 2002
CLERK

No. 01-1416

In The

Supreme Court of the United States

BRENDA LEE NADELL and BRIAN SIDNEY NADELL,

Petitioners,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, OFFICER S. LEYBA, OFFICER M. ETHERTON, OFFICER G. ZEIL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER M. ANGULO, Esq.
301 E. Clark Ave., #1000
Las Vegas, Nevada 89101
(702) 384-4012
Counsel of Record
for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED FOR REVIEW

1. Whether the Ninth Circuit correctly held Petitioner failed to establish a legitimate expectation of privacy in the facts of this case, sufficient to give rise to a Fourth Amendment unlawful search claim, when Petitioner Brenda Nadell was not established as an overnight guest in the home?

2. Whether the Ninth Circuit was correct that an instruction of nominal damages is valid in a civil rights excessive force claim?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioners Brenda Lee Nadell and Brian Sidney Nadell (hereinafter "Petitioners"), acting on behalf of themselves. Appearing as Respondents before this Court are the Las Vegas Metropolitan Police Department and Officers Leyba, Etherton and Zeil.

Since the Las Vegas Metropolitan Police Department is a governmental agency, no corporate disclosure statement, required by Supreme Court Rule 29.6, is necessary.

TABLE OF CONTENTS

Page

ISSUES PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

CITATION OF OPINION 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

I. PROCEDURAL HISTORY 2

II. STATEMENT OF THE FACTS 3

LEGAL ARGUMENT 5

I. LEGAL STANDARDS FOR REVIEW 5

II. THERE WAS NO VALID FOURTH AMENDMENT CLAIM FOR UNREASONABLE SEARCH AND SEIZURE 6

III. THE JURY INSTRUCTION ON NOMINAL DAMAGES WAS COMPLETELY APPROPRIATE 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Amarel v. Connell, 102 F.3d 1494 (9th Cir. 1996)..... 5

Atkins v. New York City, 143 F.3d 100 (2nd Cir. 1998)..... 10

Briggs v. Marshall, 93 F.3d 355 (7th Cir. 1996)..... 10

Carey v. Piphus, 435 U.S. 247 (1978)..... 10

Floyd v. Laws, 929 F.2d 1390 (9th Cir. 1991)..... 10

George v. City of Long Beach, 973 F.2d 706 (9th Cir. 1992)..... 10

Grosvenor Properties Ltd. v. Southmark Corp., 896 F.2d 1149 (9th Cir. 1989)..... 9

Horn v. Madison County Fiscal Court, 22 F.3d 653 (6th Cir.) *cert. denied*, 513 U.S. 873 (1994)..... 10

Memphis Comm. School Dist. v. Stachura, 477 U.S. 299 (1986)..... 10

Mincey v. Arizona, 473 U.S. 385 (1978)..... 8

Minnesota v. Carter, 525 U.S. 83 (1998)..... 7

Minnesota v. Olsen, 495 U.S. 91 (1990)..... 7

Nadell v. Las Vegas Metropolitan Police Department, 268 F.3d 924 (9th Cir. 2001)..... 1

People v. Higgins, 26 Cal. App. 4th 247, 31 Cal. Rptr. 2d 516 (1994)..... 9

Singer v. United States, 380 U.S. 24 (1965)..... 6

State v. Green, 164 Ariz. 431, 784 P.2d 257 (1989)...8, 9

State v. Lynd, 54 Wash. App. 18, 771 P.2d 770 (1989)..... 9

TABLE OF AUTHORITIES – Continued

Page

State v. Raines, 55 Wash. App. 459, 778 P.2d 538 (1989) 9

United States v. Payne, 944 F.2d 1458 (9th Cir. 1991) 6

United States v. Rapinsky, 109 F.2d 1436 (9th Cir. 1997) 6

United States v. Sweeting, 933 F.2d 962 (11th Cir. 1991) 8

United States v. Tibolt, 72 F.3d 965 (1st Cir. 1995), *cert. denied*, 518 U.S. 1020 (1996) 8

United States v. Vaandering, 50 F.3d 696 (9th Cir. 1995) 6

United States v. Varela, 993 F.2d 686 (9th Cir. 1993) 6

United States v. Warner, 843 F.2d 401 (9th Cir. 1988) 8

Weisgram v. Marley Co., 528 U.S. 440 (2000) 5

Westcott v. Crinklaw, 133 F.3d 658 (8th Cir. 1998) 10

RULES AND STATUTES

FRCP 50(a) 5

CITATION OF OPINION

This case is a Petition for Writ of Certiorari from the Ninth Circuit decision of *Nadell v. Las Vegas Metropolitan Police Department*, 268 F.3d 924 (9th Cir. 2001).

JURISDICTION

On March 1, 1999, at the conclusion of a several-week trial, a verdict was entered by the jury which held one of the Defendant officers liable for the use of excessive force and awarded nominal damages to Petitioner Brenda Nadell in the amount of $1.00. *See* Petitioners' Appendix B. Thereafter, this matter was timely filed before the Ninth Circuit Court of Appeals and this decision by the Jury, along with the propriety of a prior decision by the District Court Judge to dismiss an unreasonable search and seizure claim, were brought to the attention of that august body.

The decision of that Court, sustaining both of these issues, was filed by the Ninth Circuit Court of Appeals on October 5, 2001. Petitioners' Petition for Writ of Certiorari notes no petition for rehearing was timely filed. However, the Ninth Circuit did entertain, and reject, Petitioner's Request for Rehearing on December 17, 2001. This Petition is sought within 90 days of that date and would, therefore, seem to be timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents admit Petitioners' Complaint alleged a violation of Brenda Nadell's Fourth Amendment rights while she lay at the home of another in a drunken state. The instant Petition makes no direct reference to the Fourth Amendment but a fair reading of it seems to indicate the Fourth Amendment proscription against unreasonable search and seizures is being challenged. In addition, Petitioner is challenging the application of nominal damages in civil rights suits.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On September 8, 1995, Petitioners filed a lawsuit naming the Las Vegas Metropolitan Police Department and Officers Leyba, Etherton and Zeil as Defendants. Petitioners later amended their Complaint and a responsive answer was filed on January 27, 1997.

After discovery concluded, the matter proceeded to trial on February 8, 1999 and concluded March 1, 1999. At the close of Petitioners' presentation of the evidence, Respondents moved for judgment as a matter of law on all claims. The District Court granted dismissal relative to Brenda Nadell's unreasonable search and seizure claims – ruling the evidence showed she was only temporarily present in the home when the officers arrived on the night in question; accordingly, she lacked standing to bring that particular Fourth Amendment claim.

The jury at the case's conclusion, determined Officer Steve Leyba was liable for use of excessive force and, as a result, awarded $1.00 in nominal damages. A defense verdict was returned against Petitioner Brian Nadell.[1]

After post-trial motions were decided, an appeal was filed on May 21, 1999 to the Ninth Circuit Court of Appeals. There Petitioner challenged the issues which she attempts to bring before this Court. The Ninth Circuit, however, disagreed and held the District Court was correct in dismissing her Fourth Amendment claims as there was no evidence adduced proving Petitioner was an overnight guest. In addition, the Ninth Circuit sustained the instruction of the jury as to the application of nominal damages in a civil rights case. This decision issued on October 5, 2001.

II. STATEMENT OF THE FACTS

On or about July 22, 1994, Petitioner Brenda Nadell went to the home of one Michael Laing with her sister and her small child in order to allow her younger sister to interview for a babysitting job. This business meeting then evolved into a party where all the adults in the home became seriously inebriated. Petitioner Nadell did not bring with her any clothing or hygiene items to suggest she was either invited or that she planned to spend the night. Rather, the testimony indicated Petitioner became so intoxicated she, at best, was unable to travel and was

---

[1] This raises the question as to whether or not Mr. Nadell even has standing to be involved in the instant Petition since, by its very terms, the Petition only addresses claims going to Brenda Nadell.

permitted to temporarily lie down in a room because of her intoxicated state. While she was in an unconscious state a domestic dispute between Michael Laing and his spouse arose such that a plate glass window was broken at the front of the home and Ms. Laing was seriously injured – requiring hospitalization.

Officers Etherton and Zeil were dispatched to this home in response to a domestic violence call. Upon arriving, they observed not only the broken window but blood all over the front porch area, the window, the window sill, the wall of the home (both inside and outside), the curtain, a couch inside the home, and a carpeted area just inside the door. There was also evidence presented that the officers, entering the home, saw a young female (who had blood on her person) stand up and exit the living room with a small baby in her arms. They were unable to immediately detain her for questioning and, instead, she continued on to a back bedroom.

Officer Etherton followed and made contact with the woman in the back bedroom – and in so doing encountered Petitioner. Officer Leyba arrived shortly thereafter. Petitioner Nadell, in her interaction with Officer Leyba, began screaming at him and attacked him. She was ultimately restrained by being pushed up against a wall and wrestled to the ground.

The evidence before the trier of fact also indicated that, at the time the officers arrived at the home, they did not have an understanding that the individual who had bled so profusely through the home had been taken away by ambulance or whether more than one individual was injured. On these facts, it is respectfully submitted the

District Court and Ninth Circuit Court of Appeals were absolutely correct in deciding that Petitioner Nadell had no Fourth Amendment unreasonable search or seizure claim in this case.

As a simple matter of law, the issue of nominal damages will speak for itself and need no further factual explication at this time. However, it is submitted that reasoned consideration of the relevant facts of this case make it clear that the decision of the Ninth Circuit was absolutely correct and should be sustained.

LEGAL ARGUMENT

I. LEGAL STANDARDS FOR REVIEW

There are two parts to Petitioners' claim. The first is the granting of the directed verdict pursuant to FRCP 50(a) by the District Court in light of the established facts and relevant law. An order granting or denying judgment as a matter of law is reviewed by the Court on de novo grounds. *See Amarel v. Connell*, 102 F.3d 1494, 1517 (9th Cir. 1996). The decision under this provision is appropriate whenever a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. *See Weisgram v. Marley Co.*, 528 U.S. 440, 447 (2000). If, given proper consideration of that evidence, the evidence fails to establish a proper claim, dismissal is appropriate.

The second aspect of the petition seeks a review of a decision to offer a jury instruction on the issue of nominal damages. Where there is no objection to jury instructions

at the time of trial, the reviewing court looks only for plain error. *See United States v. Rapinsky*, 109 F.2d 1436, 1443 (9th Cir. 1997).[2] If there is an objection, it must be distinctly stated and the grounds for the objection must also be articulated. *United States v. Varela*, 993 F.2d 686, 688 (9th Cir. 1993). A general objection to an instruction does not suffice to preserve the issue on appeal. *Id.* In addition, jury instructions must be viewed as a whole to determine whether they were misleading or inadequate to guide the jury's deliberations. *Id.* Even with an appropriately lodged objection, the formulation of jury instructions is reviewed for an abuse of discretion. *United States v. Vaandering*, 50 F.3d 696, 702 (9th Cir. 1995). Under this standard, the evidence in this case shows the objection was properly tendered without objection. It is too late, therefore, for Petitioner to claim injury from this jury instruction. *See Singer v. United States*, 380 U.S. 24, 38 (1965). Moreover, as a simple matter of law, the judge's decision in issuing the jury instruction was absolutely correct.

II. THERE WAS NO VALID FOURTH AMENDMENT CLAIM FOR UNREASONABLE SEARCH AND SEIZURE

As the Ninth Circuit properly noted, the evidence adduced by Petitioners, at the time they rested their case, did not establish Appellant was an overnight guest or an individual with any possessory interest in the home of

---

[2] "Plain error" is a highly prejudicial error effecting substantial rights. *United States v. Payne*, 944 F.2d 1458, 1463 (9th Cir. 1991).

Michael Laing at the time the officers entered the home. Laing testified he gave the officers permission to enter the home. Moreover, the testimony was clear Petitioner Nadell did not come to the home with the intent of spending the night. In fact, at no time was evidence given that she was asked to spend the night or that she made the request to be able to spend the night. Rather, at most she simply wanted to lie down.

There was no evidence given to the jury by Petitioners that she would never have left the home until she was completely sober. There was no evidence provided to the jury as to how long it would take for her to be sober. There is no evidence that she had a possessory interest in the home, historical use of the property, or ability to regulate access. In short, she was little more than a short-term resident which, under the law, failed to give her proper standing to assert a Fourth Amendment unreasonable search and seizure claim for the officers entering the home and/or the bedroom in which she was lying down. Moreover, the exigent circumstances on which the officers arrived at the home warranted their entry therein.

This Court has held an overnight guest has a reasonable expectation of privacy in a friend's residence even though the guest may not have legal authority to determine who may enter the household. *Minnesota v. Olsen*, 495 U.S. 91 (1990). One who is merely present in the home with the consent of the householder, may not claim protection under the Fourth Amendment. *Minnesota v. Carter*, 525 U.S. 83 (1998). Without some evidence given to the jury that Laing had invited her to spend the night or that she had the intent upon arriving at the home to do so, she

had no reasonable expectation of privacy to allege unconstitutional entry and search of the home as a short-term guest. *United States v. Sweeting*, 933 F.2d 962, 964 (11th Cir. 1991). There is no error here.

Moreover, there is no question the officers arrived in response to a domestic violence call and, upon their arrival, saw a large amount of blood and evidence of violence at the residence itself. The Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe a person is in need of immediate aid. *Mincey v. Arizona*, 473 U.S. 385, 393 (1978). Such a situation exists when there is a "need to protect or preserve life or avoid serious injury." *Id.* Upon arriving at the home in response to a domestic abuse call, and seeing the blood, without knowledge that Laing's wife had already been taken to the hospital, there is no question the officers were allowed to enter the home because of a possible medical emergency. *United States v. Tibolt*, 72 F.3d 965, 969 (1st Cir. 1995), *cert. denied*, 518 U.S. 1020 (1996). These facts are viewed for the totality of circumstances known to the officer at the time of the warrantless entry. *United States v. Warner*, 843 F.2d 401, 403 (9th Cir. 1988).

In the case of *State v. Green*, 164 Ariz. 431, 784 P.2d 257 (1989), the Court was called upon to determine whether an entry by police officers responding to a domestic violence call were legally justified in entering the home without a warrant or even consent. The Arizona Supreme Court held domestic violence calls "commonly involve dangerous situations in which the possibility for physical harm or damage escalates rapidly. Immediate presence of the officer is essential." *Id.* at 259. To require

an officer to have a search warrant before entering a dwelling would create a "meaningless delay" which would lead to the occurrence of otherwise avoidable violence. *Id.* The fact such a call is received was a "sufficient indication that an exigency exists allowing the officer to enter a dwelling if no circumstances indicate that entry is unnecessary." *Id.* Upon entering the apartment, the Arizona court reasoned the officer could then lawfully take steps reasonably calculated to the continued investigation of the offense and the identification of the perpetrator. *Id.* Included in these steps there would be a protected walk through the building. *Id.* Other courts are in accord. *See People v. Higgins*, 26 Cal. App. 4th 247, 31 Cal. Rptr. 2d 516 (1994); *State v. Lynd*, 54 Wash. App. 18, 771 P.2d 770 (1989); *State v. Raines*, 55 Wash. App. 459, 778 P.2d 538 (1989).

Given these facts and law, it is clear the officers were appropriate in entering the home in the manner that they did and in conducting an investigation which they did. It is also clear, as a matter of law, the district court was correct to dismiss this claim from this litigation and the Ninth Circuit was correct in sustaining that decision. On certiorari, that result should not change.

III. THE JURY INSTRUCTION ON NOMINAL DAMAGES WAS COMPLETELY APPROPRIATE

As indicated, the failure to oppose the giving of an instruction on a timely basis constitutes a waiver of the ability to have the instruction challenged and reviewed on appeal. *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1152-53 (9th Cir. 1989). In this case, Judge Pro

modified the nominal damages instruction after an initial objection by Petitioners. After the instruction was modified, no objection was raised. Thus, this issue is moot.

More importantly, the law which this Court articulated in civil rights cases is that nominal damages may be awarded in a civil rights action when sufficient substantive evidence of actual injury is adduced in the minds of the jury. *Carey v. Piphus*, 435 U.S. 247, 255 (1978). Thus, if a plaintiff may prove a violation of constitutional rights, nominal damages are always appropriate. *Floyd v. Laws*, 929 F.2d 1390, 1401 (9th Cir. 1991).

It is important to note, however, that merely proving a violation of a federally secured right is insufficient to warrant an award of damages which are greater than nominal. In fact, there must be credible evidence that the violation proximately caused an injury. *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 659 (6th Cir.), *cert. denied*, 513 U.S. 873 (1994). "The abstract value of a constitutional right may not form the basis for Section 1983 damages." *Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299, 308 (1986). Thus, a nominal damage instruction is always appropriate when there is a violation of a constitutional right without accompanying credible proof of compensatory damages. *George v. City of Long Beach*, 973 F.2d 706, 708 (9th Cir. 1992).

Contrary to Petitioners' claim, a verdict of nominal damages in conjunction with findings of excessive force are not, by definition, incongruous. *See Atkins v. New York City*, 143 F.3d 100, 102 (2nd Cir. 1998); *Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996). In *Westcott v. Crinklaw*, 133 F.3d 658, 661 (8th Cir. 1998), the circuit court identified a

number of situations in which a jury may reasonably conclude compensatory damages are inappropriate despite a finding of excessive force; one of these included "when the plaintiff's injuries have no monetary value or are insufficient to justify with reasonable certainty."

As the Ninth Circuit properly noted, there was more than sufficient evidence placed before the jury that the physical injuries which Petitioner attempted to parade before the trier of fact were self-inflicted. They were caused not only by her own self-destructive behavior, but also her direct resistance of the officers' attempts to properly bring her into custody and control. This decision by the trier of fact is beyond cavil. The giving of the instruction is beyond question and, therefore, should not be reversed on certiorari.

CONCLUSION

For the foregoing reasons, Respondents Las Vegas Metropolitan Police Department, Officer Etherton, Officer Leyba and Officer Zeil respectfully request this Court deny Petitioners' Petition for Writ of Certiorari and allow the Ninth Circuit decision to stand.

Respectfully submitted this 1st day of April, 2002.

RAWLINGS, OLSON, CANNON,
GORMLEY & DESRUISSEAUX

By
PETER M. ANGULO, ESQ.
301 E. Clark Ave., #1000
Las Vegas, Nevada 89101
Attorneys for Respondents